

**IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA**

**2010 MTWCC 12**

**WCC No. 2008-2152**

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**BROCK HOPKINS**

**Petitioner**

**vs.**

**UNINSURED EMPLOYERS' FUND**

**Respondent**

**And**

**UNINSURED EMPLOYERS' FUND**

**Third-Party Petitioner**

**vs.**

**RUSSELL A. KILPATRICK**

**Third-Party Respondent**

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**ORDER DENYING RULE 60(a), M. R. Civ. P. MOTION TO AMEND  
JUDGMENT TO CORRECT CLERICAL MISTAKE**

**Summary:** The Uninsured Employers' Fund (UEF) moved the Court to amend its Judgment to require the third-party respondent to indemnify the UEF for any benefits paid or payable by the UEF to Petitioner. The UEF characterized the omission of this issue in the Court's Findings of Fact, Conclusions of Law and Judgment as a "clerical mistake."

**Held:** The UEF's motion is denied. The omission of this issue in the Court's Findings of Fact, Conclusions of Law, and Judgment was not a "clerical mistake." The Court did not

address the issue of whether the third-party respondent was obligated to indemnify the UEF because it was not presented as a disputed issue in the final pretrial order.

¶ 1 On May 4, 2010, the Court entered Findings of Fact, Conclusions of Law, and Judgment in this matter in which I set forth the Court's determination of the disputed issues presented by the parties in the final pretrial order. On May 11, 2010, the Uninsured Employers' Fund (UEF) filed a motion entitled "Rule 60(a), M. R. Civ. P. Motion to Amend Judgment to Correct Clerical Mistake." On May 21, 2010, I initiated a conference call, during which I advised the parties that I was denying the UEF's motion. I advised the parties as to my reasons for denying the motion and informed them that I would follow up my oral ruling with a written order.

¶ 2 In its entirety, the UEF's motion<sup>1</sup> reads as follows:

COMES NOW Montana Department of Labor & Industry, Uninsured Employers' Fund (UEF), through counsel, and moves the Court to amend its Findings of Fact, Conclusions of Law and Judgment in this matter to correct a clerical oversight.

From the day UEF entered this case through the close of trial, the UEF has prayed for and contended that if Russell A. Kilpatrick was an uninsured employer on November 2, 2007, then he is obligated, pursuant to Section 39-71-504, MCA, to indemnify the UEF for any benefits paid or payable by the UEF to Hopkins. No other party ever challenged this contention.

WHEREFORE, the UEF prays the Court amend its Judgment to reflect the above.

¶ 3 ARM 24.5.344(1), provides in pertinent part: "After a trial, the court will issue . . . findings of fact and conclusions of law and judgment setting forth the court's determination ***of the disputed issues***." (Emphasis added.) The disputed issues are set forth in the final pretrial order.<sup>2</sup> The pretrial order is signed by all parties.<sup>3</sup> Upon approval by the Court, the pretrial order supersedes all other pleadings and governs

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<sup>1</sup> Although the UEF's motion was not accompanied by a supporting brief, I have elected to address the substance of the motion rather than summarily denying it pursuant to ARM 24.5.316(4).

<sup>2</sup> ARM 24.5.318(5)(e).

<sup>3</sup> ARM 24.5.318(5).

the trial proceedings.<sup>4</sup> Amendments to the pretrial order shall be allowed by either stipulation of the parties or leave of Court for good cause shown.<sup>5</sup>

¶ 4 The final pretrial order in this case, which was signed by all parties, set forth the following disputed issues for the court to determine:

- (1) Whether Hopkins was employed by Kilpatrick at the time of Hopkins's injury on November 2, 2007.
- (2) Whether Hopkins was in the course of his employment at the time of his injury.
- (3) Whether non-prescription drug use is the major contributing cause of the injuries Hopkins sustained on November 2, 2007.
- (4) Whether Hopkins was performing services for Kilpatrick in return for aid and sustenance only.
- (5) Whether Kilpatrick owed a duty of coverage to Hopkins.<sup>6</sup>

¶ 5 In accordance with ARM 24.5.344(1), the Court issued Findings of Fact, Conclusions of Law, and Judgment setting forth the Court's determination of the disputed issues. Contrary to the UEF's motion, the Court's omission of whether Kilpatrick is obligated to indemnify the UEF was not a "clerical mistake." The Court did not determine this issue because it was not presented as an issue for the Court's determination. It was not the Court's prerogative to *sua sponte* resolve an issue that was not presented for resolution in the final pretrial order.

¶ 6 This Order makes no assessment as to whether the UEF may have a legitimate basis for requesting the Court to amend its judgment to include the indemnification issue. However, two conclusory paragraphs erroneously characterizing the omission of this issue as a "clerical mistake" while failing to even acknowledge that the issue was not presented in the final pretrial order does not provide that basis.

### ORDER

¶ 7 The UEF's Rule 60(a), M. R. Civ. P. Motion to Amend Judgment to Correct Clerical Mistake is **DENIED**.

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<sup>4</sup> ARM 24.5.318(6)

<sup>5</sup> *Id.*

<sup>6</sup> Final pretrial order at 4.

DATED in Helena, Montana, this 24th day of May, 2010.

(SEAL)

JAMES JEREMIAH SHEA  
JUDGE

c: Jeffrey Ellingson  
Joseph R. Nevin  
Russell A. Kilpatrick